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## DUE PROCESS OF LAW IN STATE LABOR LEGISLATION

BY FOWLER VINCENT HARPER\*

## PART THREE

## VI.

*Some Conclusions About Due Process of Law*

With this material in mind, is it possible to arrive at any useful conclusions as to what constitutes due process of law in labor legislation? In each group of cases, there seem to be two distinct, though inseparable functions of the judicial process of reviewing the legislation in question. The courts, in brief, are arriving at conclusions both of fact and of law. The impression was, at one time prevalent that the extent of review of certain types of labor legislation was limited to the reasonableness of the statute as respects the end sought and the means of attaining that end, upon the facts as presented to the court. The same was contended with respect to legislative review in other fields,<sup>290</sup> for example, review of rate fixing activities of administrative boards.<sup>291</sup> It was thought that the court could not substitute its own conclusions of fact for the findings of the board or legislature. But this position seems to have been abandoned as far as rates were concerned since 1920,<sup>292</sup> and so far as labor legislation was concerned, courts have long since done what amounted to arriving at independent findings of fact. It has been a necessary complement to determining the question of

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<sup>290</sup>"This Court is slow to declare that the State legislature is wrong in its facts." *Adams v. Milwaukee*, 228 U. S. 572, 57 L. Ed. 971, 33 Sup. Ct. 610. "Only in exceptional cases that this Court does not accept facts as found by the State Supreme Court." *Portland R. R. Co. v. Oregon R. R. Comm.*, 229 U. S. 397, 57 L. Ed. 1248, 33 Sup. Ct. 820 (1913).

<sup>291</sup>*New York and Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. Ed. 337, 39 Sup. Ct. 122 (1917).

<sup>292</sup>*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 Sup. Ct. 527 (1920).

law involved, for it is impossible to find the law until the facts are determined.<sup>293</sup>

A great deal has been said about the question of reasonableness in general, whether it be a question of law or a question of fact. The query has been answered in so many ways in different types of cases<sup>294</sup> that one is quite confident that the vital matter in most of them is whether the question should be decided by the court or by the jury. In reviewing legislation, however, all questions are for the court, so the distinction is of little practical importance. For purposes of analysis, however, it seems better to recognize what Austin long ago pointed out, namely that the matter of reasonableness is neither a question of fact nor one of law, but whether the given law is applicable to the given facts.<sup>295</sup>

But here, indeed, is the clue to the judicial process in legislative review. Given the facts, the court must then "apply" a principle of law to arrive at the solution of the question of law. To do this, the application of the standard of reasonableness is necessary, to determine whether the principle of law is applicable to the given facts. But this standard is essentially a moral standard, for the due process of law clause has grafted directly on to our constitutional law, a standard from the science of ethics.<sup>296</sup> This standard is, at

<sup>293</sup>Cf. *Holmes in Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227, 53 L. Ed. 150, 29 Sup. Ct. 67 (1908): "A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide."

<sup>294</sup>Depending upon whether the "facts" were disputed or not.

<sup>295</sup>"And this, I suppose is what people were driving at when they have agitated the very absurd question whether questions of this kind (reasonableness) are questions of law or fact \* \* \* The truth is that they were questions neither of what the law is, or what the fact is, but whether the given law is applicable to the given fact." Lecture VI, *Jurisprudence I*, 230 (5th ed., 1911).

<sup>296</sup>"A great and increasing part of the administration of justice is achieved through legal standards. These standards come into the law, in the stage of fusion or morals, through theories of natural law. They have to do with conduct, or with conduct of enterprises, and contain a large moral element. \* \* \* They are applied according to the circumstances of each case, and within wide limits are applied through an intuition of what is just and fair, involving a moral judgment upon the particular item of conduct in question." *Pound, Law and Morals*, 60 (1924). Cf. *Holmes, Common Law*, 110, 111 (1881).

least in legal theory, an unvarying one,<sup>297</sup> and all differences in results are due to differences in the factual content of the situation from which the question arises.<sup>298</sup>

Apparently, then, the first thing to do is to look at the methods of arriving at the facts. If the correct solution of the problem of reasonableness lies in seeking the relationship between the facts and the law, an inadequate determination of the facts is fatal to a sound result.

The greatest danger in the past has been that the courts have not felt the necessity or recognized the importance of a correct analysis and determination of the facts in this type of case as a preliminary function to determining the relationship of the law thereto. The process that actually takes place is, of course, one that it is difficult to analyze, but the two distinct determinations are actually occurring nevertheless. Too often, however, courts have been content to arrive at conclusions from metaphysical premises by a strict adherence to the logic based upon the "jurisprudence of pure conceptions." Thus, for example, the court in *Ritchie v. People*,<sup>299</sup> steeped in a century old natural law philosophy, announces that women have a natural equality with men, and consequently legislation involving classification based upon the difference in sexes, such as fixing the hours of labor, must necessarily be unconstitutional. Premises of this kind have not infrequently resulted in a perfectly undesirable conclusion through a perfectly logical process of reasoning.<sup>300</sup> But the realities of life are ignored; facts, as those most affected and concerned know them, are disregarded, and what Dean Pound calls "mechanical jurisprudence"<sup>301</sup> defeats a jurisprudence, tuned to the realities of the society which it is intended

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<sup>297</sup>"Law is or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society \* \* \* make a change in the application of principles absolutely necessary to an intelligent administration of government." *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52 (1902).

<sup>298</sup>*Cf. Stettler v. O'Hara*, 69 Or. 519, 532. *Cf. also Euclid v. Ambler Realty Co.*, syllabus 2, 47 Sup. Ct. 114 (1927). See also Harper, "Natural Law in American Constitutional Theory," 26 *Mich. L. Rev.* 62 (1927).

<sup>299</sup>155 Ill. 98, 40 N.E. 454, *supra*.

<sup>300</sup>*Cf. the cases considering and condemning payment of wage statutes, ante*, pp. 33-37.

<sup>301</sup>See 8 *Col. L. Rev.* 605 (1908).

to serve.<sup>302</sup> The classic observation of Mr. Justice Holmes that the life of the law has been experience rather than logic, seems charged with profound significance.<sup>303</sup>

The real objection to the so called "jurisprudence of conceptions," so frequently referred to in contempt, is not that it is a jurisprudence of conceptions, but rather that in the use of conceptions, the facts are ignored, that is to say, the conclusions reached by the deductions from legal conceptions, are not continually tested and criticised, pragmatically, (1) by the principles rather than the rules of the authorities, i.e., the precedents; and, more important still, (2) by the facts in the particular case, for in handling conceptions there is ever the danger of getting away from realities, and forgetting that the conceptions are, after all, a means to an end, and of treating them for their own sake, as an end in themselves.

The methods by which courts have apprized themselves of the essential facts in cases under discussion have been subjected to some extensive development. Upon the theory of judicial review, the court is confined to the evidence as set forth in the record.<sup>304</sup> The adjudging of the evidence is not included within the function of a court of review. This limitation, when strictly adhered to not only results in decisions wanting in soundness but places the courts in the embarrassing position of being obligated to determine the reasonableness of a situation, most of the vital and significant facts of which are beyond their knowledge, and, what is worse, not available to them. Thus courts have complained because of insufficient evidence from which an intelligent conclusion might be reached.<sup>305</sup>

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<sup>302</sup>Cf. Pound, 25 *Harv. L. Rev.* 146, discussing "American judges who insist upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts," citing *Lochner v. New York*, *Adair v. United States* and others. Cf. also Pound, "Liberty of Contract," 18 *Yale L. J.* 454, 468 (1909).

<sup>303</sup>Cf. Pound, "Liberty of Contract," *supra*, 464.

<sup>304</sup>See, for example, *State v. Barba*, 132 La. 768, 772, *supra*, where the court, invalidating an eight hour act for stationary firemen, observed: "There is no suggestion in the record that the occupation of a stationary fireman is dangerous or unhealthy to such degree as to warrant the interference of the State. \* \* \*"

<sup>305</sup>See *People v. Schweinler Press*, 214 N. Y. 395, 410-411, *supra*, where the court complains of the insufficient evidence in *People v. Williams*, 189 N. Y. 131, *supra*, decided seven years before.

The court in *People v. Schweinler Press*<sup>306</sup> was so reluctant to pass upon the constitutionality of the act before it, without as much information as possible, that it expressly considered and referred to the report of the investigation commission appointed by the legislature, defending its right to rely upon this information, thus,

"In the decision of the legislature whether it should adopt such legislation, and in the determination by us whether the legislature was justified in adopting it, that body was and we are entitled to take into account the report made by the commission. . . ."

The record, then, at best, is unlikely to provide sufficient facts to support a thorough consideration of the real issue, and frequently leads to results, both undesirable and unscientific. Under such circumstances, in the absence of other fact-finding machinery, courts have found themselves pitifully handicapped. Sometimes the record will disclose testimony and opinions of an expert nature by men of science, calculated to be of some assistance to the courts,<sup>307</sup> but in other situations such evidence has been excluded.<sup>308</sup>

In 1908 a new device was instituted in the Oregon hours of labor case<sup>309</sup> when Mr. Louis Brandeis submitted several hundred pages of scientific data demonstrating the effect upon the child-bearing capacity of women of excessive fatigue induced by long hours of toil. The Court was asked to take judicial notice of this material on the ground that it consisted of facts established by science and by experimentation, and could therefore be assumed to be within the knowledge of the Court. The material had been available to the Court had they cared to go to the exhaustive trouble to secure it for themselves. Attorneys, however, by incorporating it in their brief, had merely made it more accessible.<sup>310</sup>

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<sup>306</sup>*Supra*, 404.

<sup>307</sup>In *People v. Marx*, 99 N. Y. 377, 2 N.E. 29 (1885).

<sup>308</sup>In *State v. Cantwell*, 179 Mo. 245, *supra*, expert testimony which tended to show that underground work such as that contemplated by the Missouri statute fixing hours of labor in mines was not attended with danger to the health of those engaged in working therein, was excluded. The court argued that the validity of laws enacted in the exercise of the police power could not be made dependent upon the views of experts as to the necessity of such enactment. For similar ruling, see *Ex parte Kair*, 28 Nev. 127, *supra*.

<sup>309</sup>*Muller v. Oregon*, 208 U. S. 412, *supra*.

<sup>310</sup>See *ibid.*, 420.

Three years before, the Court in the *Lochner* case<sup>311</sup> had made mention of the *common understanding*: "To the common understanding the trade of a baker has never been regarded as an unhealthy one." In the *Muller* case, it appears that the effect of fatigue upon the child-bearing functions of women is a matter of general knowledge, or that which is known and intelligible to the *common understanding*. In the *Schweinker* case<sup>312</sup>, the New York court had resorted to matters of *common observation*: "We know as a matter of common observation that such labor is generally performed indoors and that under average conditions and surroundings existing in factories, even when performed in the daytime, it is ordinarily arduous and exacting."<sup>313</sup>

Apparently matters of general knowledge and of common understanding should be called to the attention of the courts. But the common understanding is not altogether a safe guide to determine the constitutionality of a law.<sup>314</sup> Some such matters may be taken into consideration as the subject of judicial cognizance, without special attention directed to them while still other must be incorporated in counsels' briefs and arguments. Just how far data and evidences of facts contained in sociological briefs influence, or are seriously considered by the courts, it is hard to say. Since 1908, counsel for both sides of contested labor laws have, of course, availed themselves of the results of extensive researches in social phenomena, of a more or less accurate nature. In theory, it is doubtlessly quite possible and rational for courts to make use of this material. A great deal of it is unquestionably of much value: a great deal more is probably quite as valueless and inaccurate,<sup>315</sup> for it is not dif-

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<sup>311</sup>198 U. S. 45, *supra*.

<sup>312</sup>214 N. Y. 395, *supra*.

<sup>313</sup>*Ibid*, 401.

<sup>314</sup>*Cf.* Freund, "Limitation of Hours of Labor and the Federal Supreme Court," 17 *Green Bag*, 411, 415-416 (1925).

<sup>315</sup>*Cf.* Burke Shartel, commenting on the Michigan sterilization of mental defectives case, *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925): "The legislature is not heard, nor is the court required to have any part of the legislative record before it. The court must depend chiefly on the briefs of counsel for evidence of the facts as well as for the usual legal argument. \* \* \* The difficulty with those ways of getting at the facts is not much different from the difficulty we would see in having the jury get its knowledge

difficult to find facts to support a conclusion charged with vital interest to litigants.

It can not be denied, however, that the sociological brief, the value of which rests upon the theory of judicial notice, is a tremendous improvement over the older methods of acquiring an extensive familiarity with the facts in such cases. A good many years before Mr. Justice Holmes had written:

"I have in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy."<sup>316</sup>

But is the sociological brief the best possible way of engaging the results of science to serve the law? Many of the same objections lie to such briefs as are applicable to expert testimony. Perhaps the greatest of these is that they are partisan, and when science is employed for partisan ends, it is seldom undiminished in scientific value. At best, it is difficult for science, thus presented, to enlist the confidence of the public, be they friends or foes to particular social legislation. And yet, courts must have information, in some way or another. They are continually confronted with issues, the settling of which demands equipment and machinery which they do not have available. There are many students of these matters who believe that, to keep pace with progress and to satisfy the de-

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anywhere and everywhere. The facts simply can not be adequately tested and proved without some real opportunity to explain and controvert, and even more important, without a real opportunity for the court itself to investigate the facts. In the case before us we see brought out the weakness of these haphazard ways of getting at the facts. \* \* \* Indeed a reading of all of the opinions will convince anyone familiar with the subject that none of the justices understands very well the nature of the social problems arising from feeble-mindedness or the medical procedures in sterilization, though the nature of those problems and the seriousness of the treatment or operation seem to be highly important in deciding whether sterilization is an arbitrary and unconstitutional measure." "Sterilization of Mental Defectives," 24 *Mich. L. Rev.* 1, 20 (1925).

<sup>316</sup>*Science in Law—Law in Science, Collected Papers*, 242, (1920).



mands of the future, some surer and more accurate method of determining facts must be devised. A number of years after the introduction of the statistical brief, Mr. Felix Frankfurter, himself well trained in the preparation of such documents, expressed himself.

"With the recognition that these questions raise substantially disputed questions of fact, must come the invention of some machinery by which knowledge of the facts which are the foundation of the legal judgment may be at the service of the courts, as a regular form of the judicial process. This need has been voiced alike by lawyers and judges."<sup>317</sup>

And Dean Pound, expressing a similar conviction, insists: "It is not one of the least problems of the sociological jurist to discover a rational mode of advising the court of facts of which it is supposed to take judicial notice."<sup>318</sup>

The sociological brief is inadequate, unsatisfactory and unconvincing, to say nothing of the inconvenience attending the courts' effort to carefully consider and sift the significant fact from the chaff which invariably accompanies them. Both judges and scholars realize the imperative demand for reliable and expeditious sources of data, prepared and determined by men trained in the particular science or field of knowledge involved in litigation.

But changes come slowly, and judicial machinery must, perhaps necessarily, be the last to permit of intrusions, save by cautious and deliberate steps. Nevertheless the profession is facing the situation realistically and rationally. In January 1926, Dean Henry Bates, in an address before the Nebraska Bar Association at Omaha, proposed a solution, pregnant with significance and potentialities. Referring to the Law Schools of the larger state universities, Dean Bates, declared,

"A legal research bureau established in connection with such schools might conduct researches in the legal and economic or other fields concerned in legislation under review by the courts, and upon request or suggestion of the court furnish valuable studies to those

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<sup>317</sup>"Hours of Labor and Realism in Constitutional Law," 29 *Harv. L. Rev.* 353, 372-373 (1916).

<sup>318</sup>*Publication of the American Sociological Society*, 7, 148, 161 (1912).

tribunals in the performance of their delicate and difficult task. Such a bureau should be composed of lawyers trained in the work of investigation, and the staff should include economists, sociologists, accountants, and statisticians, to investigate whatever province of knowledge may be indicated in relation to the matter before the court. Legislation regarding taxation, transportation, regulation and rate-making for public utilities, labor, and in fact all economic and social welfare legislation, involves matters of this kind. Under competent legal direction and only under such direction, can we hope for investigations and studies which will be of aid to the courts. To be sure there are in existence vast stores of scientific information, data and statistics, but coordinated or correlated in no way, with legislation or legal principle. Such coordination is the work of lawyers. The information thus supplied would, of course, not take the place of evidence, expert testimony, or any of the other sources of information, at present available to the court. It would be advisory only and in no legal sense controlling upon the judges. It would be a substitute only for the speculation, guesswork, reaction to prejudice and other motivating concepts, now lumped together as matters of 'judicial cognizance.' Such information thus would tend not to displace, restrict or limit the judge in any respect, but would give him valuable and dependable information regarding the fact foundation upon which a statute must be supported or set aside."

Here is a suggestion which indicates that the time is ripe for lawyers to attempt a solution of this complex problem. Our courts are carrying a heavy burden, and relief must come from within the profession in the immediate future if they are to discharge their duties intelligently and satisfactorily. Facts are the sources and the causes of the law. Out of the facts arise the jurisprudence of real life, and this jurisprudence, to live and grow, must be kept in close and immediate contact with the realities of life, for in those realities its roots are inextricably embedded.

Given a correct understanding of the facts, derived from reliable and scientific sources, there still remains the application of the standard of reasonableness to determine on which side of the line the preponderance of interests involved lies. There seems to be two methods of application, which may be called the subjective and the

objective methods. These methods were early distinguished in libel cases, in determining whether a new trial should be granted. The "subjective" method was enunciated in *Soloman v. Bitton*,<sup>319</sup> but Lord Halsbury laid down the true rule, the objective standard, in *Metropolitan R. R. v. Wright*.<sup>320</sup>

It is obvious that if the former method of applying the standard is indulged, in reviewing labor legislation, courts do little more than substitute their notion of reasonableness for that of the legislature;<sup>321</sup> if the latter method is adopted, the courts do naught but establish an outside limit beyond which the conclusion of reasonable men shall be conclusively presumed not to extend.<sup>322</sup> In general, it has been declared that a presumption always exists in favor of the constitutionality of legislative enactments.<sup>323</sup> This resolves the proposition that if reasonable men might find the statute reasonably related to an end fairly within the police power, due process is satisfied. Examination indicates that in the early labor cases, where the validity of the acts was frequently denied, the courts were either ignoring the facts,<sup>324</sup> or they were failing to apply the objective standard of reasonableness.<sup>325</sup> On the other hand, the later cases, and many

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<sup>319</sup>8 Q. B. D. 176 (1881). " \* \* \* the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the action was or (was) not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to." *Ibid*, 177.

<sup>320</sup>11 App. Cas. 152 (1886). "If the word 'might' were substituted for 'ought to' in *Solomon v. Bitton* I think the principle would be accurately stated." *Ibid*, 156.

<sup>321</sup>See Bikle, "Judicial Review of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 *Harv. L. Rev.* 6, (1924). Cf. Goodnow, *Social Reform and the Constitution*, 247 (1911). Cf. Hall, *Popular Government*, 187.

<sup>322</sup>See Thayer, *Legal Essays*, 27 (1908). Cf. Freund, "Constitutional Limitations of Labor Legislation," 4 *Ill. L. Rev.* 609, 622-623 (1910).

<sup>323</sup>See Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162 (1800); McLean v. Arkansas, 211 U. S. 539, *supra*; Plymouth Coal Co. v. Pa., 232 U. S. 531, *supra*.

<sup>324</sup>See Re Jacobs, *supra*; State v. Goodwill, *supra*; Frorer v. People, *supra*; State v. Loomis, *supra*.

<sup>325</sup>Lochner v. New York, *supra*; Adkins v. Children's Hospital, *supra*.

dissenting opinions of the older cases, indicate that the objective standard was the one employed.<sup>326</sup>

Professor Kales attempted to show that inasmuch as there were dissenting opinions in such cases as *Lochner v. New York*, the objective standard either was not applied, or was impossible of application.<sup>327</sup> It is true that intelligent men have differed. But the question involved in the objective standard is not whether there actually be reasonable and intelligent men who disagree, but whether the individual judge can understand and admit that an intelligent man may reasonably do so. Thus it is declared:

"One has only to look at the *Lochner* case, the *Adair* and *Coppage* cases, *Smith v. Texas*, the *Upper Berth* case, to find that acts which intelligent dissenting judges could regard as falling within the formula of the law teachers, were held invalid. This demonstrates the futility of the formula, and a legal formula which does not work in a close case is not of much use to council."<sup>328</sup>

This objection, however, is more apparent than actual. The objective standard does not necessarily demand that the judge regard the dissenting vote of an intelligent brother on the bench, as conclusive of what the reasonable man may do, unless he, the judge, can himself recognize the grounds for that dissenting vote, and fairly grant their reasonable validity. The difference is not unlike that between the weight of the evidence, and evidence beyond a reasonable doubt, that marks the distinction between the subjective and the objective standards. So long as courts must grant that reasonable doubts exist as to the validity of the statute, its constitutionality may not be put in issue. Mr. Justice Holmes has ever insisted upon the objective application of the standard. Mr. Frankfurter, some years ago, wrote of the venerable judge:

"He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment, not as to its wisdom, but as to

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<sup>326</sup>Cf. *Radice v. New York*, *supra*; *McLean v. Arkansas*, *supra*; dissenting opinion of Holmes in *Lochner v. New York* and *Adkins v. Children's Hospital*, *supra*.

<sup>327</sup>"Due Process, the Inarticulate Major Premise, etc.," 26 *Yale L. J.* 519, 522-523 (1917).

<sup>328</sup>12 *Pol. S. Rev.* 241, 243.

their right to entertain the reasonableness of its wisdom. We touch here the most sensitive spot in our Constitutional system."<sup>329</sup>

And yet Mr. Justice Holmes has held acts unconstitutional.<sup>330</sup> He, perhaps more than any other member of the Supreme Court, has been slower to invalidate legislative enactments, because of his strict adherence to the objective test, always examining closely to eliminate his own prejudices and to entertain nothing of the subjective element in his decisions. In what perhaps is his best known dissent, he said:

"The accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."<sup>331</sup>

The ever constant fear seems to haunt the learned justice that in his own thinking, he may exclude that which intelligent men find reasonable, because of his own lack of experience. "Judges," he declares,<sup>332</sup> "are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."

The fact situation, however closely connected with the issue, must, in theory be kept apart as a separate process. In applying the doctrine of the reasonable man, he must be understood to be completely apprised of all the facts, as the Court know them. What the reasonable man would hold to be valid under a knowledge of certain facts by no means imposes the obligation to hold the same act valid with a knowledge of certain other facts. It is precisely this adjusting of the conclusions, to accord with variations in the factual situation that distinguishes the standard from the legal principle, or still more, from the rule of law. After the facts are once determined, the reasonable man is resorted to. The judge certainly is no more

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<sup>329</sup>"Constitutional Opinions of Justice Holmes," 29 *Harv. L. Rev.* 683, 686 (1916).

<sup>330</sup>For example, *Wolf Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, *supra*.

<sup>331</sup>*Lochner v. New York*, 198 U. S. 45, 75.

<sup>332</sup>*Speeches* by Oliver Wendell Holmes, 98, 101.

this reasonable man than the legislator. He is as hard to find as the individual for whom Diogones sought so diligently. He is but a standard, a conception set up by the law, and must necessarily be an objective one. As soon as he becomes subjective, he loses his identity and becomes one with the court. The reasonable man, as an hypothesis, has then vanished.

From this estimation of the process of the courts in reviewing labor legislation and in the light of the results reached, several distinct movements seem to be apparent. In the first place there is a growth of an honest realism in the attack upon such problems. Courts are not only aware that great masses of factual matter are necessary to an intelligible conclusion, but they show, on the whole, a kindly attitude toward any attempt to make such material available to them. About all that is lacking is proper agencies to place the scientific resources of the State at the service of the judiciary in this work. The most important part of the problem namely, the recognition that there is a vital need for such fact-finding agencies, seems to be fairly solved. Apparently the courts are willing to make reasonable use of the results of scientific investigations and researches, if the same can be brought to them in a reasonably convenient manner. At least there is not the blind approach to such matters that characterized the early stages of judicial review of such legislation. This it seems, may be interpreted as an immeasurably hopeful indication of an intelligent solution of the more complex problems of this nature which are inevitably bound to absorb the attention of the judiciary in the future.

Secondly, there seems to be a more or less stable philosophy of law being gradually substituted for the older naive notions of "natural law," "fundamental principles of justice," "inherent rights of man" and the like, which in some form or other, crept into late nineteenth century and early twentieth century opinions. The idea that "liberty" and "freedom" are some God-given attributes which no law can take from man, that they are absolute, inviolable rights, inalienable from man's estate, has, in large measure, though perhaps not entirely abandoned. In its place, a sociological conception of liberty and freedom has evolved which recognizes that in their con-

crete manifestation these proud heritages of the common law are but relative, rather than absolute.

This new "freedom" is recognized in the developpement of the weapons of labor unions such as the strike, the boycott, and the practice of picketing.<sup>333</sup> Social and economic inequalities are consequently cut down to the end that, though the liberty of a few may be continually and increasingly curtailed, there is being realized, by way of compensation, the fuller liberty of great classes. From being an individual conception, liberty, under pressure of democracy, has become a social ideal. In some phases of the law governing the relations of capital and labor, there have been recent decisions not at all reassuring. The *Journeyman Stone Cutters Decision*,<sup>333a</sup> for example, seems reactionary. But matching the *Stone Cutters* case is *Exchange Bakery v. Rifkins*,<sup>333b</sup> in which the court of a leading industrial state recognizes the economic facts and implications of collective bargaining, as they affect the laborer, as certainly as the rights of the employer in his business.

A new conception of "property" has materially interfered with the hallowed mediaeval conception of liberty as well as older notions of property. Thus the worker is enabled to secure constitutional protection to his "property" right of economic or industrial reputation, in witness whereof may be cited the service letter laws.<sup>334</sup>

But what has become of the old dogma of natural law advocates that there must be, and there is, in constitutional law as elsewhere, an unchanging principle of justice, which is the key to the solution of every problem? Has this idealistic dream been forever shattered? We do not understand it so. The doctrine of reasonableness has, it seems fair to say, taken its place in the category of a pure, formal idea or conception of relationship. Labor laws are reasonable, relatively, or unreasonable relatively. This is not to say that the conception of reasonableness is a changing one. Such language as that of Mr. Justice Eakin indicates otherwise:

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<sup>333</sup>See *ante*, p. 242 and notes.

<sup>333a</sup>*Bedford Stone Cutters v. Journeyman Stone Cutters Assn.*, 274 U. S. 37, 47 Sup. Ct. 522 (1927); see comment in 37 *Yale L. J.* 80 (1927).

<sup>333b</sup>245 N. Y. 260, 157 N.E. 130 (1927); see comment in 37 *Yale L. J.* 249 (1927).

<sup>334</sup>See *ante*, pp. 44-45.

"\* \* \* but, because of confusing the power (police power) itself with the changing conditions calling for its application, many of the definitions are inexact and unsatisfactory. The courts have latterly eliminated much of the confusion by pointing out that, instead of the power being expanded to apply to new conditions, the new conditions are, as they arise, brought within the immutable and unchanging principles underlying the power."<sup>335</sup>

But we see that laws are not reasonable or unreasonable *per se*. They are not, merely, as laws, with or without due process of law. They possess or want the quality of reasonableness, as they relate to situations and circumstances only. In the earlier cases these facts were inconsequential and the circumstances immaterial. It was "too plain for argument" that a law restricting hours for which a laborer might contract to work was unconstitutional, regardless of and independent of facts.<sup>336</sup> But now the reasonableness of such acts depends upon the relation between the means and the end, or, in its objective application, what reasonable men might find such a relationship to be.

Thus we preserve our unchanging idea of reasonableness, but it becomes, not an ideal pattern which we hope to reproduce in our actual laws in positive form, but that "unattainable and yet sure guiding star" which, though we know it to be but a standard, we will rely upon it to keep us on our path,<sup>337</sup> and headed aright.

History, then, serves a different purpose in such matters. No longer, save in the exceptional instance,<sup>338</sup> is it used to fashion premises for arriving at results. We are developing a more philosophical conception of history. We may look to this mass of decisions on the validity of labor legislation with Hegelian eyes, as the gradual unfolding of our idea of due process of law. Not that it is to be found, in any decision, or any language, but that, in view of the constant evolution, we may catch the principles which unify

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<sup>335</sup>Stettler v. O'Hara, 69 Or. 519, 532, *supra*.

<sup>336</sup>People v. Orange Co. Road etc. Co., 175 N. Y. 84, *supra*.

<sup>337</sup>See Stammer, "Fundamental Tendencies in Modern Jurisprudence," 21 Mich. L. Rev. 862, 884 (1923).

<sup>338</sup>Such as Adkins v. Children's Hospital, *supra*, and perhaps Myers v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. 625 (1923).



and rationalize these decisions.<sup>339</sup> "We reject history as the limits of the unfolding idea, but regard it merely as indicating the direction in which we may expect it to be manifested.

Lastly, this realism in searching for solid factual grounds for decision; these socialized revisions of older absolute notions of property and freedom; this slow development of the objective standard of reasonableness to the position of the Platonic *idea*,<sup>340</sup> Stammler's "sure guiding star;" all this has given rise to the ultimate result of "due process of law" functioning, in the legal order, as a legal norm, determined by the *mores* of the day, the time and the place. Thus we find latitude for the development of new social interests, and a legal theory for their protection.

The variation in the moral sense alters immediately the intensity and the quantity of interests, on one side or the other of the balance. One result of later years is undoubtedly a different attitude toward life, health, and comfort. The social and moral value of these attributes, and hence their legal value, have undergone tremendous change. It must not be forgotten that courts of less than forty years ago were denying that the public had any interest in the health of large classes of laboring men.<sup>341</sup> But with the idea, among intelligent persons, that the standard of what is and what is not moral should be predicated upon something which resembles what the new psychology calls behavioristic ethics, rather than mediaeval notions of theology, the impression has begun to take form that anything is moral which contributes materially to the biological welfare and physical well being of the community.

So as our standards of morality change, likewise does the norm of due process produce different results. As the number of enlightened members of society increase, so must the standards be raised. As physical science becomes more and more effective to demonstrate the effects upon society of certain institutions and habits, what was once regarded as an "unreasonable" restriction upon individual interests becomes at once both moral and reasonable,

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<sup>339</sup>See *Cardozo, Nature of the Judicial Process*, 31 (1922), cited, *ante*, p. 5.

<sup>340</sup>See Joseph H. Drake, "Juristic Idealism and Legal Practice," 25 *Mich. L. Rev.* 571, 573-574 (1927).

<sup>341</sup>For example, *Re Morgan*, *supra*, pp. 21-22.

and therefore constitutional. But with this broad latitude for social experimentation, the test still remains whether reasonable men might conceive or understand how the means might accomplish the ends.

Paradoxically as it may seem, we have developed a philosophy which attains the compromise between stability and elasticity. It has achieved what no other system of natural law has ever succeeded in attaining, namely, adjustability to the time, place, and conditions.<sup>342</sup> This is possible because of the constant and unvarying form, although the matter and content change. Thus realism has crept into our philosophy as well as into our science of law.

No longer do we content ourselves with bald and patently inadequate abstractions. Other systems of natural law have failed for these reasons. And yet the legal order cannot be maintained without something of permanence and fixity. In the past, natural law has produced only the illusion of permanence.<sup>343</sup> It could not withstand the force of progress. No place has this pressure been felt more than in constitutional dogmas of liberty and property in labor regulation. And yet out of the ruins of the old, the new structure has been built, with provisions for the very things which its predecessor wanted. Industrial progress is recognized as creating new situations to which the legal norm can be applied to weigh the various interests involved without changing the constitutional protections and guarantees in the least.<sup>344</sup> The police power is not expanded, but "new conditions are, as they arise, brought within the immutable and unchanging principles underlying the power." The formal element thus remains unchanged. Only the content varies.

Thus we have, at least in part, begun to realize a correlation of philosophy, of history, and of science, to produce, so far as our problem is concerned, a veritable "natural law with a changing content,"<sup>345</sup> to the end that law may better be adjusted to fulfilling the

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<sup>342</sup>Cf. *Berolzheimer, World's Legal Philosophies*, 410, 413, 414 (1924).

<sup>343</sup>Because of the "notion of an ideal form of the social status quo" Cf. *Pound, Introduction to the Philosophy of Law*, 35.

<sup>344</sup>Cf. Harper, "Natural Law in American Constitutional Theory," 26 *Mich. L. Rev.* 67 (1927).

<sup>345</sup>See *Stammler, Theory of Justice*, 107 (1925).

wants of men. Philosophy of law here seems tending, judging from the evidence in labor cases, to make law elastic whereas for a century it had made it fixed and certain.<sup>346</sup> But in so doing, it seeks to avoid the mistakes of four centuries ago. Its constancy is recognizedly a formal one, with a content that is adjusted to the conditions of the time and place. This follows from the circumstance that the standard of due process of law now functions in the legal order as a norm dependent upon the *mores* of the day. Morals are never absolute; they are but a "code of conduct more or less haphazardly developed for groups, and varying with the nature and circumstances of the group."<sup>347</sup> Following and consequential to this process, there develops the clashing and weighing of interests, presently brought within the limits of the law. The whole and net result is that "due process of law" grows coincidently with this general evolutionary movement of the social order, this continuous development of oppositions, with their temporary merging and reconciliation.<sup>348</sup> Running with the mass of apparent contradictions and paradoxes, however, we may detect the formula which legal philosophy deems desirable to refute the reproach of the past, and, which it confidently believes adequate to meet the challenge of the future.

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<sup>346</sup>Cf. Pound, *Spirit of the Common Law*, 146 (1921).

<sup>347</sup>Durant, *Story of Philosophy*, 314 (1926).

<sup>348</sup>*Ibid.*, 322.